F. M. S. REPORTS

[APPELLATE CIVIL JURISDICTION]
THOMAS, C.J. (F.M.S.), HUGGARD, C.J. (S.S.)
AND BURTON, J.
January 10, 1935.

R. G. SABHAPATHI PILLAY.....Appellant

vs.

THAM HING KWAI.....Respondent

[NEGRI SEMBILAN CIVIL APPEAL No. 10 of 1934]

The Civil Procedure Code, 1918, sections 2, 265 and 274—Attachment and sale of a decree—Right to sue for damages.

In Seremban Civil Appeal No. 9 of 1931 the Court of Appeal ordered that the present respondent was entitled to a declaration that the sale of his land by the Collector of Land Revenue was an invasion of his rights, and it was further ordered that the action be remitted to the Court below for an inquiry as to the amount of damages, if any, suffered by the present respondent.

By the same order the Court of Appeal ordered the present respondent to pay the taxed costs of that appeal to the present appellant.

The present respondent failed to pay these taxed costs and the present appellant applied for execution of his order for costs by attachment of that portion of the order of the Court of Appeal which entitled the present respondent to an inquiry for damages. That portion of the order was attached under section 274 (iii) of the Civil Procedure Code, 1918.

Held, by Sir Walter Huggard, C.J. (Straits Settlements) and Burton J., (Sir Samuel Thomas, C.J. dissenting) that what was attached was a mere right to sue for damages which is excluded from attachment by section 265 (i) (e) of the Civil Procedure Code, 1918.

Decision of Mudie, J., affirmed.

G. A. Hereford for the appellant.

F. A. Wright for the respondent.

Cur. Ad. Vult.

SIR SAMUEL THOMAS, C.J.—This is an appeal from the judgment of Mudie, J. dismissing a petition in bankruptcy on the ground that no act of bankruptcy had been committed.

In the bankruptcy petition the petitioning creditor, R. G. Sabhapathi Pillay alleged the following acts of bankruptcy against Tham Heng Kwai the debtor, viz :—

"(1) That the property of the said Tham Heng Kwai in the above suit No. 75 of 1931 for the costs of the above suit No. 75 of 1931 and of Court of Appeal No. 9 of 1931 (for the total sum of $1,733.99) had been attached and sold;

(2). The said Tham Heng Kwai has filed an affidavit in Originating Summons No. 27 of 1934 saying that he is a pauper and to appeal *in forma pauperis* unable to pay statutory deposit affidavit fees and appeal fees."

The appeal only relates to the former of the two alleged acts of bankruptcy.

The first act is not set out very clearly, but as the learned Judge says in his judgment, it would seem that the petitioner considered that it came within section 4 (i) (e) of the Bankruptcy Enactment, 1912. That section is as follows :—

"The debtor commits an act of bankruptcy in each of the following cases:—(e) If execution issued against him has been levied by seizure of his property under process in an action or in any civil proceeding in a Court of a Judicial Commissioner or a Court of a Magistrate of the First Class when the judgment including costs is for an amount exceeding one hundred dollars."

In Seremban Civil Appeal No. 9 of 1931 the debtor (present respondent) had been the appellant, and the petitioner (present appellant) the second respondent. On the hearing of that appeal it was ordered amongst other matters that the action should be remitted to the Court below for an enquiry to be held in such manner as the said Court should think fit as to the amount of damages, if any, suffered by the plaintiff-appellant, and that judgment should be entered for the plaintiff-appellant for the amount, if any, so found to be due. It was also ordered that the plaintiff-appellant should pay to the second defendant-respondent his costs of the appeal as taxed between party and party. It was further ordered that the plaintiff-appellant should pay to the second defendant-respondent the costs of the trial in the Court below to be taxed as between party and party.

As a result of that order the plaintiff-appellant (present respondent) was liable to pay certain sums for costs to the second defendant-respondent (present appellant). The plaintiff-appellant (present respondent) might also recover something by way of damages from a person other than the second defendant-respondent (present appellant). These costs not having been paid that part of the decree which related to the damages of the plaintiff-appellant (present respondent) was attached and sold by the second defendant-respondent (present appellant). It actually realised twenty-eight dollars. It was in respect of this attachment that the second defendant-respondent (present appellant) alleged the ground of bankruptcy which has already been set out.

Now, it is noticeable that in the decree of the Court of Appeal there is no sum certain awarded, but it is ordered that the enquiry shall be held as to the amount of damages, if any, and that judgment is to be entered for the amount, if any, so found to be due. This language would appear to disagree with the former part of the decree which ordered that the plaintiff-appellant (present respondent) should be entitled to a declaration that the sale by the Collector was an invasion of his rights. Thereby it would seem that the plaintiff appellant (present respondent) would in any event be entitled to at least nominal damages. However, the decree must be taken as it is, and therefore it cannot be considered as definitely giving any sum however small to the plaintiff-appellant (present respondent).

If any small sum had been awarded, then no difficulty would arise on this part of the case. There would be only the other question to be considered, viz. whether a part of a decree can be attached. But to revert. In that no definite sum has been awarded it has been contended that there is nothing to attach.

In this connection section 265 of the Civil Procedure Code has been referred to. Therein are set out the particulars which are not liable to attachment. Included in these are:—(e) mere rights to sue for damages, (k) an expectancy of succession by survivorship or other merely contingent or possible right or interest.

With regard to the former of these exceptions, if no suit had been brought and no decree had been obtained, there could be no question that there existed a mere right to sue for damages. But, has the bringing of the suit, the obtaining of a declaration that there has been an invasion of rights, and an order for the assessment of damages made any difference?

Provision is made in the Civil Procedure Code, section 274 for the attachment of a decree. Sub-section (i) relates to a decree for the payment of money. Sub-section (ii) says:—

> "In the case of all other decrees the attachment shall be made by a notice in writing by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such Court a notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent....."

By section 2 of the Civil Procedure Code (Amendment) Enactment, 1929, decree is defined as meaning the formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

It will be seen that whereas the definition refers to preliminary and final decree, section 274 of the Civil Procedure Code makes no such distinction, and uses the words 'in the case of all other decrees.'

Now, in the case of *Syud Tuffuzzool Hussein Khan* v. *Raghoonath Pershad and Ladlee Pershad*, 14 Moore's Ind. App. Cases 40 the head-note reads as follows :—

> "Under a remit from the Privy Council to the Court of first instance, to refer to arbitration, with the consent of the parties, the accounts of a partnership firm, a reference under a submission and order of the Court was duly made to arbitrators. Before any award made, the 'rights and interests' of one of the parties in the award were by order of the Court, sold by auction in satisfaction of a decree against him made in another suit by a third party. Held that the expectant claim under an inchoate award was not 'property' within the meaning of section 205 of Act No. VIII of 1859 and was not saleable in execution of a decree."

In the course of the judgment the following occurs:—

> "Their Lordships think that this very case affords a clear proof of the wisdom of that construction which the judgment under appeal has put upon the words of this Act The Courts have power to secure at once the rights of creditors and those of debtors by a judicious application of the powers of the Act; but their Lordships feel that it would be a cruel wrong and injustice if under colour of an execution, a thing described as a 'claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to Arbitrators' could be put up to judicial sale; a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a descripton as if it had been 'all the claims of Ramnath against all his Debtors'. It is obvious, moreover, what a door of fraud would be opened if pending a reference, the Award of the Arbitrators could be put up for sale. Their Lordships throw no kind of doubt on the powers of the Court by sequestration or direct seizure, notice to Debtors or otherwise, to sell or administer, in execution of a Decree-creditor's claim all that the former law allowed him .... Sections 236, 241 and 243 of the Code provide sufficiently what debts due to the judgment-debtor may be received and applied in satisfaction of the judgment debt without the sacrifice consequent on a judicial sale. And their Lordships are satisfied that there is nothing in that Code to authorise such a sale as has been proposed to be made in this case, and which would require for its justification words too plain to be mistaken and too inflexible to be controlled."

Now, the facts in that case are very similar to the facts in the case at present under consideration. There would appear to be this distinction, viz. that whereas in that case the claim alone was sold, in the present case the decree itself was sold. In view of the words which I have quoted from the judgment in the *Syud* v. *Ragunath* case, I have no hesitation in saying that the one course seems to be as objectionable as the other. If then this had been merely an

application to set aside the sale, I am of the opinion that the application must have been allowed.

Section 286 of the Civil Procedure Code provides that:

> "any Court executing a decree may . . . . order that any property attached by it and liable to sale . . . . shall be sold."

But the procedure relating to decrees is different They are attached, and where possible, enforced, and the proceeds are applied in satisfaction of the decree in respect of which they are attached. Notices may be given to the judgment-debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of an order of attachment after receipt of notice either through the Court or otherwise shall be recognised by any Court as long as the attachment remains in force.

In the case of *Glegg* v. *Bromley*, (1912) 3 K.B. 474 it was held that the assignment of moneys to which a plaintiff in an action for damages may become entitled was not an assignment of a mere expectancy, or a cause of action, but was an assignment of property. That is, that the fruits of the judgment can be regarded as property. A distinction is drawn between such fruits and a bare right of action. Parker, J. says:—

> "In the first place I think that according to a true construction of the mortgage in question the subject matter assigned is money or other property which might thereafter be acquired by means of the pending action for slander. It is not an existing chose in action, but future property identified by reference to an existing chose in action. It is, I think, necessary to bear this distinction in mind, particularly in view of the course taken by the argument of counsel for the respondent. Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity whether themselves legal or cquitable choses . . . There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action, and this was so whether the bare right were legal or equitable . . . The question was whether the subject matter of the assignment was, in view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity."

That is the distinction which, in my opinion, has to be drawn in the present case. When section 265 of the Civil Procedure Code speaks of the mere rights to sue for damages, it refers to what Parker, J. calls 'a bare right to bring an action,' and not to what he calls 'property with an incidental remedy for its recovery.'

With regard to the second exception, section 265 (k) of the Civil Procedure Code relates to an expectancy of succession, or survivorship or other merely contingent or possible right of interest. I consider that the latter words are a development of the first words of the sub-section, and relate to kindred matters, and therefore, that they do not affect the rights conferred by the decree under consideration.

In my opinion, therefore, the rights given to the plaintiff-appellant (present respondent) do not come within the exception contained in section 265 of the Civil Procedure Code.

I come to the conclusion, therefore, that this decree could be attached. It is possible that but very doubtful benefit would be likely to accrue from such attachment. Still the attachment would prevent any payment or adjustment being recognised by any Court, and in the event of there being any fruits of the enquiry, when held, they would be preserved for the benefit of the attaching creditor.

I can find no authority for the contention that it is not permissible for one person obtaining rights under a decree to attach the rights of another person obtaining rights under the same decree. I can see no reason why such a course should not be adopted. Although for convenience the findings of a Court are included in one decree, as far as the interests of the various parties are concerned, they are in no wise different from separate decrees.

It would seem to be very cumbersome for the Court to order that any benefit obtained by one of the parties should be available in satisfaction of the benefit obtained by any other party; moreover such an order might delay a party from obtaining payment of what was due to him.

And in the present case such an order might have prevented the present appellant from recovering the payment of his costs until the question of the payment of damages (if any) to the present respondent has been decided, although the present appellant would not be interested in that result, if he could obtain the payment of his costs by other means.

Turning to section 4 of the Bankruptcy Enactment, a debtor commits an act of bankruptcy if execution issued against him has been levied by seizure of his property under process etc. Property is defined in the Bankruptcy Enactment as including

> "money, goods, things in action, land and every description of property, moveable or immoveable, and whether situated in the States and elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future,

vested or contingent, arising out of or incident to property as above defined."

This definition of property is so wide that there are obviously cases in which an actual seizure would not be possible. The definition of property liable to attachment under the Civil Procedure Code is also so wide that an actual seizure would be precluded in some cases. Section 4 of the Bankruptcy Enactment does not employ the words 'actual seizure'.

In the case of *In re Hobson*, (1886) 33 Ch. D. 493 it was held that where an execution has been issued, the return of the Sheriff was not essential to complete the title of the execution creditors.

In the case of *Muttan Chand Kanyalal* v. *Bank of Madras*, I.L.R. 27 Mad. 346 it was held that when the Court seal had been affixed to the outer door of a warehouse, without breaking the door and taking physical possession of the goods inside the warehouse, the property had been attached, and that this was in effect an actual seizure.

In the present case the decree had not only been seized but had also been sold. Even if the sale should be regarded as improper, and for these purposes should be set aside, there remains the attachment. That was a seizure of the property of the debtor under process of the Court.

I am, therefore, satisfied that an act of bankruptcy had been committed by the debtor-respondent to this appeal, and that the petition in bankruptcy should be reinstated for rehearing before the Judge in bankruptcy.

The appeal is allowed with costs here and below.

SIR WALTER HUGGARD, C.J. (STRAITS SETTLEMENTS).—This is an appeal from the decision of Mudie, J. dismissing a Bankruptcy Petition filed by the appellant against the respondent.

The facts are not in dispute.

The appellant and the respondent were parties to Seremban Civil Suit No. 75 of 1931 which eventually came before the Court of Appeal in June, 1932, as Seremban Civil Appeal No. 9 of 1931.

Under the order of the Court of Appeal, dated the 14th day of June, 1932, it was ordered that the present respondent was entitled to a declaration that the sale (of his land) by the Collector of Land Revenue was an invasion of his rights, and it was further ordered that the action should be remitted to the Court below for an enquiry to be held in such manner as the said Court should think fit as to the amount of damages, if any, suffered by the present respondent and that judgment should be entered for him for the amount, if any, so found to be due

By the same order of the Court of Appeal it was also ordered that the present respondent should pay to the present appellant his costs of that appeal and of the trial in the Court below as taxed between party and party.

These costs were taxed in due course at $1,733.99 but the present respondent failed to pay them. The present appellant then applied for execution of his order for costs by attachment of that portion of the order of the Court of Appeal which entitled the present respondent to an enquiry as to damages. That portion of the order was thereupon attached under section 274 (iii) of the Civil Procedure Code and was subsequently put up for sale and sold by auction for $28.

The present appellant then filed a Petition for a Receiving Order against the present respondent in which the alleged acts of bankruptcy were stated to be:—

(1) that property of the present respondent had been attached and sold; and
(2) that the present respondent had filed an affidavit in Originating Summons No. 27 of 1934 saying that he was a pauper.

In other words it was alleged that the present respondent had committed acts of bankruptcy within the provisions of paragraphs (e) and (f) of section 4 (i) of the Bankruptcy Enactment, 1912.

The learned Judge in the Court below held that no act of bankruptcy had been committed and he dismissed the Petition. From that decision the appellant has appealed, but the appeal relates only to the decision regarding the first alleged act of bankruptcy mentioned above.

The first question to be considered is whether the portion of the order of the Court of Appeal which was attached in the present case is a "decree" within the meaning of that term as defined in section 2 of the Civil Procedure Code (Amendment) Enactment, 1929. The definition is as follows:—

" 'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 254 but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

" (b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

In my opinion the portion of the order of the Court of Appeal which was attached here is a decree within the meaning of this definition. It is the formal expression of an adjudication which, so far as regards the Court expressing it (i.e. the Court of Appeal), conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, and therefore, in my view, it clearly falls within the scope of the statutory definition.

Now assuming that the portion of the order of the Court of Appeal which was attached is a decree, the next question which arises is whether this decree was properly attachable under section 274 of the Civil Procedure Code, 1918. In the Court below the learned Judge held that the attachment was wrong because—as I understand his Grounds of Judgment—the decree which was executed and the decree which was attached were the same. I do not agree that in fact they were the same. It is true that they were contained in the same order of Court, but, in the view I take of the matter, they were separate and distinct decrees, one being in favour of the appellant and one being in favour of the respondent. I can find nothing in section 274 of the Code or elsewhere which suggests that a decree-holder is precluded from attaching a decree passed in favour of his judgment-debtor merely because both decrees are contained in the same order of Court.

The answer to the question whether this decree was properly attachable really depends on whether it can be regarded as property liable to attachment under the provisions of section 265 of the Code. On this point it was contended on behalf of the appellant that it is covered by the words:—

> "Other saleable property . . . . . belonging to the judgment-debtor or over which he has a disposing power which he may exercise for his own benefit . . . . . "

in section 265 (i) and that it is not excluded under the proviso. For the respondent, on the other hand, it was argued that if this decree can be regarded as property at all then it is expressly excluded from attachment by paragraphs (e) and (k) as being a mere right to sue for damages or a mere contingent or possible right or interest.

In support of this argument the respondent relies on the express terms of the decree as passed by the Court of Appeal and which reads thus:

> "It is ordered that the Plaintiff-Appellant be entitled to a declaration that the sale by the Collector was an invasion of his rights and it is further ordered that this action be remitted to the Court below for an enquiry to be held in such manner as the said Court shall think fit as to the amount of the damages, if any, suffered by the Plaintiff-Appellant and that Judgment be entered for the Plaintiff-Appellant for the amount, if any, so found to be due."

The respondent's contention is that in view of the use of the words "if any" the decree confers nothing more than a right to continue the suit for damages which, according to the order of the Court of Appeal, may or may not have been suffered, and consequently the respondent's right or interest is merely a contingent or possible one.

The appellant resists this contention and argues that under of the Court of Appeal the respondent's right to damages has been established. He relies strongly on the decision in *Glegg* v. *Bromley*, (1912) 3 K.B. 474 where it was held that an assignment of the fruits of an action was not an assignment of a mere expectancy, or of a cause of action, but was an assignment of property.

I do not consider, however, that the decision in *Glegg* v. *Bromley* carries the appellant far enough. No doubt the respondent here could properly have sold or assigned the fruits of his action as and when recovered by him, and on the authority of *Glegg* v. *Bromley* such a sale or assignment would have been a sale or assignment of property. But the question here is, not whether the respondent's rights under the decree could be sold or assigned, but whether the decree has been properly attached under the provisions of the Civil Procedure Code.

In my opinion it is clear that what has been attached here by the appellant is merely the respondent's right to have an enquiry held as to whether or not he has suffered any damage; and the effect of the attachment and subsequent sale of the decree is merely to transfer to the purchaser the right to step into the respondent's shoes and, in his own name, to prosecute the enquiry as to whether or not the respondent is entitled to any sum for damages. The actual terms of the order of the Court of Appeal cannot be ignored, and having regard to the use of the words "if any" I think it must necessarily be inferred that the Court of Appeal had in mind the possibility that the respondent had suffered no damage at all.

Looking at the matter from this point of view I find it impossible to draw any material distinction between what has been attached in the present case and a "mere right to sue for damages" which is expressly excepted from attachment under paragraph (e) of the proviso to section 265 of the Code.

This view of the matter appears to find support in the decision of the Calcutta Appellate Court in *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India, Ltd.* I.L.R. 9 Cal. 695 where it was held that the right to sue for mesne profits was a mere right to sue for damages within the meaning of the corresponding provision of

the Indian Code, and therefore could not be attached.

The view that this decree is not attachable appears to be further supported by the decision of the Privy Council in *Syud Tuffuzzool Hussein Khan* v. *Raghoonath Pershad and Ladlee Pershad*, 14 Moore's Ind. App. Cases 40. In that case the accounts of a partnership firm were, by consent of the parties, referred to arbitration. Before an award was made, the "rights and interests" of one of the parties were by order of Court sold by auction in satisfaction of a decree against him made in another suit by a third party. It was held that the expectant claim under an inchoate award was not "property" and was not saleable in execution of a decree. The following passages from the Judgment of the Privy Council appear at pages 50 and 51 of the Report:—

> "It appears plainly . . . . . that a mere expectancy, or a mere right of suit, cannot be attached, that the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result.
>
> The attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award is made, to what the debtor will be entitled."

That appears to me to be exactly the position in the case before us. Having regard to the terms of the order of the Court of Appeal it is quite uncertain, until the enquiry has been held, to what the respondent here will be entitled, or, indeed, if he will be entitled to anything at all.

I have therefore come to the conclusion that what has been attached here is nothing more than a mere right to sue for damages or a mere expectancy, and that the order of attachment was wrongly made.

Having arrived at this conclusion it is unnecessary for me to consider whether, in order to bring the matter within section 4 (i) (e) of the Bankruptcy Enactment, "actual physical seizure" was necessary.

As the decree was not, in my judgment, attachable it follows that no act of bankruptcy can have been committed.

I would therefore dismiss the appeal with costs.

BURTON, J.—This appeal arises out of a somewhat involved decree of the Court of Appeal in Negri Sembilan Civil Appeal No. 9 of 1931 in which *inter alia* Tham Heng Kwai obtained a declaration that the sale of his land by the Collector of Land Revenue, Port Dickson, was an invasion of his rights, and an order that

> "this action be remitted to the Court below for an inquiry to be held in such manner as the said Court shall think fit as to the amount of damages, if any, suffered by the Plaintiff-appellant, and that judgment be entered for the Plaintiff-appellant for the amount, if any, found to be due."

In the same decree there was an order that Tham Heng Kwai pay to Sabhapathi Pillay, the petitioning creditor, his costs of the appeal. These costs have not been paid. The decree is dated 14th June, 1932. In January, 1934 Sabhapathi Pillay issued execution against Tham Heng Kwai for these costs and the costs of the original hearing due by him, amounting to $1,733.99 by applying under section 235 of the Civil Procedure Code to attach

> "the decree in this suit as delivered by the Court of Appeal in Civil Appeal No. 9 of 1931 in so far as it relates to an enquiry to be held by this Honourable Court as to the amount of damages, if any, suffered etc."

The application asks for attachment to be made under section 274 (iii) of the Civil Procedure Code.

The attachment was executed and the right to damages was sold for $28.00. Sabhapathi Pillay then petitioned for the bankruptcy of Tham Hing Kwai, alleging as the acts of bankruptcy—

(a) that the property of the said Tham Heng Kwai had been attached and sold which is an act of bankruptcy under section 4 (e) of the Bankruptcy Enactment 1912.

(b) that he had filed a declaration of his inability to pay his debts, which is an act of bankruptcy under section 4 (f) of the Bankruptcy Enactment 1912.

Mudie, J. dismissed the petition holding that an application to appeal *in forma pauperis* is not a declaration of inability to pay debts, and there is no appeal on this point.

He also held that the Petitioning Creditor failed on the first ground, and it is against this part of Mudie, J.'s order that the Petitioning Creditor now appeals.

The first question raised was whether this right of Tham Heng Kwai is a decree and attachable under section 274 (iii) of the Code. The decree in this suit is the Order of the Court of Appeal; it is composite and partly preliminary and partly final, and the Petitioning Creditor only attempted to attach it in so far as it related to the inquiry into damages. The rights of the other parties to the suit are determined in the decree, and with these the Petitioning Creditor had no concern; but it was impossible in the nature of the case for him to attach the decree. He could only attach part of it. But although it is, I think, perfectly clear from the actual words of the Code that it does not contemplate the attachment of part of a decree, and does not provide any machinery for such attachment,

nevertheless, as it is merely a matter of procedure, I should hesitate to say that if the relief obtained came within the scope of property liable to attachment in section 265 of the Code, it could not be attached and sold, though possibly by some other means than the machinery provided by section 274 (iii).

But in my view of the case this point does not fall to be decided, as I think it is clear on another ground that the rights of Tham Heng Kwai could not be attached.

The basis of the Petitioning Creditor's rights are contained in the Order of the Court of Appeal of June, 1932, and in the words I have quoted; and I think that it is perfectly clear from that order that all the Court of Appeal has given to Tham Heng Kwai is a right to go back to the trial Court and ascertain whether he has suffered any actual damage or not. From the insertion of the words "if any" I infer that the Court of Appeal contemplated the possibility that no actual damage had been suffered. What the Petitioning Creditor has attempted to attach, therefore, is the right of Tham Heng Kwai to ascertain whether he has suffered any damage, or not.

But whether this right of Tham Heng Kwai can be attached depends fundamentally on whether it comes within section 265. Mr. Hereford relied very strongly on the case of *Glegg* v. *Bromley*, (1912) 3 K.B. 474 in which there was in dispute an indenture in which the plaintiff assigned to her husband

> "all that interest . . . . . due to him"

and the Court of Appeal held that an assignment of the fruits of an action as and when recovered was an assignment of property. Vaughan Williams, L. J. said at page 484—

> "I think that all that was assigned was the fruits of an action. I know no rule of law which prevents the assignment of fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on; in fact, the result of a compromise is actually included as a subject of the assignment."

But if we accept *Glegg* v. *Bromley* as an authority that Tham Heng Kwai's rights under this decree are property and capable of assignment, it does not necessarily follow that they can be attached. They are not, I think, exempted under (k) for Vaughan Williams, L.J. says :—

> "I think this was an assignment of property, not of an expectancy. It is the assignment of property in the shape of the fruits of an action."

But I have come to the conclusion that Tham Heng Kwai's rights are excluded under:—

> "(e) mere rights to sue for damages."

It is true that Tham Heng Kwai has got an order for an inquiry, but beyond the declaration that there has been an invasion of his rights, he is no nearer to ascertaining his damages than he was at the beginning of the action, and what he has now, is nothing but a mere right to ascertain whether he has suffered any damage, and if so, how much.

It has been suggested that as Tham Heng Kwai has suffered an invasion of his rights, he is entitled at least to nominal damages; and if he were, I think the case would probably have to be considered on quite different lines. But the answer to that argument is that the decree of the Court of Appeal does not say so, and that that is now the basis of Tham Heng Kwai's rights and we cannot go behind it. I am confirmed in my view of this exemption by the case of *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India*, I.L.R. 9 Cal. 695 where it was decided that the right to sue for mesne profits being only a right to sue for damages could not be attached because of the corresponding provisions of the Indian Civil Procedure Code. The case seems to be parallel to the present case, because the trespass which gave the right to the mesne profits was not in dispute, the wrongful possession of the taluk by Shoshi Bhoosan Shaha and Shyam Chand Koondoo having been established.

Moreover the effect of the procedure adopted in selling the decree at auction would be not, I conceive, to give the auction-purchaser a charge on the proceeds of Tham Heng Kwai's action, but to substitute him for Tham Heng Kwai as beneficiary under the decree, to transfer Tham Heng Kwai's rights to him. And in this connexion I should like again to refer *Glegg* v. *Bromley*. Fletcher Moulton, L.J. at page 488 says—

> "We are all agreed that you cannot assign a cause of action for a personal wrong. . . . . It is clearly intended to assign the fruits of the action, so that whatever benefit comes from the action shall go to to Mr. Glegg by way of further security, but there is nothing which gives him the right to intervene in the action or which is in any way against public policy."

This is quite different from our case where the attachment was levied against the decree "in so far as it relates to an enquiry to be held by this Honourable Court as to the amount of damages, if any, suffered by the Plaintiff herein, and the judgment to be entered for the Plaintiff for the amount, if any, so found to be due on such enquiry," and the purchaser at auction would become the transferee of the decree (see section 240) and would be at liberty to intervene in the suit and carry it on in his own name. This is, I think, what Mudie J. meant when he said that the effect of this execution is to alter the order of the Court of Appeal. This is a practical difficulty which is also contrary to public policy, and I do not think the Legislature can have

contemplated the possibility of such an execution when it framed the Code.

Mr. Wright also argued that stress should be laid on the word seizure in section 4 (e) of the Bankruptcy Enactment, and that seizure could only mean physical seizures as contemplated in sections 267 and 271 where the words "actual seizure" are found. The corresponding section of the Bankruptcy Act in England provides that execution must have been levied by seizure of the debtor's goods, and it is difficult to see what else the word "seizure" in section 4 (e) Bankruptcy Enactment can mean except actual seizure. It is of importance to the argument that the word seizure which originally occurred in paragraph (j) of this section has been altered to "attachment" by Enactment 36 of 1933, but has been left in paragraph (e); and further section 43 (ii) of the Bankruptcy Enactment shows how seizure is used therein.

But I do not think it is necessary to decide this point; I prefer to decide it on the point that the rights of Tham Heng Kwai under the decree are exempted from attachment, and I think the appeal should be dismissed with costs.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]
HUGGARD, C.J. (S.S.), THOMAS, C.J. (F.M.S.) & BURTON, J.
April 11, 1935.

TUNKU ABAIDAH & ANOR. .....Appellants

v.

TAN BOON HOE .....Respondent

[KEDAH CIVIL APPEAL No. 8 of 1353]

The Reciprocal Enforcement of Judgments Enactment, 1342, section 3 (ii) (b)—Registration of judgment.

The mere presence of a defendant in a country at a time when an obligation is incurred does not of itself give the Courts jurisdiction over him in respect of such obligation.

The words "being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court" in section 3 (ii) (b) of the Reciprocal Enforcement of Judgments Enactment, 1342, do not relate to the time at which the contract was entered into but to the date on which the proceedings were instituted in the original Court.

C. D. D. Hogan for the appellants.

E. A. de Buriatte for the respondent.

Cur. Ad. Vult

SIR WALTER HUGGARD, C.J. (STRAITS SETTLEMENTS)—This is an appeal from the decision of the learned Judge of the First Division dismissing an application by the second Defendant to set aside the registration of a judgment which had been registered under the provisions of the Reciprocal Enforcement of Judgments Enactment, 1342.

The facts, as to which there is no dispute, may be briefly stated. In 1932 the respondent instituted proceedings in the Supreme Court at Penang against the appellant and her husband to recover monies due for principal and interest on a promissory note. Judgment in default of appearance was entered against the appellant on the 3rd May, 1934. At the date of the execution of the promissory note the appellant was temporarily residing at Penang, but before the proceedings referred to were commenced she had left Penang and had returned to her home in Kedah where she still resides. The Writ in Penang suit was served upon her in Kedah.

In 1934 the respondent applied to the Judge of the First Division for an order that the judgment obtained at Penang should be registered in the High Court of Kedah under the Reciprocal Enforcement of Judgments Enactment, 1342, and on the 18th September, 1934, it was ordered that the judgment be registered against the appellant, leave being given to her to apply within fourteen days to set aside the registration. In October, 1934, the appellant applied to set aside the registration of the judgment but her application was dismissed by the learned Judge of the First Division. It is from that decision that this appeal arises.

In support of her appeal the appellant relies on the provisions of Section 3 (ii) of the Reciprocal Enforcement of Judgments Enactment and she contends that registration of the judgment in the present case should not have been ordered on two grounds:—

(1) that the Supreme Court at Penang in entering judgment against her had acted without jurisdiction and

(2) that she, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the Supreme Court at Penang, had not voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of that Court.

In considering the first of these two grounds it has to be borne in mind that the appellant was and is a subject of the State of Kedah (which in relation to Penang must be regarded as a foreign state), that she was temporarily resident at Penang at the date of the execution of the promissory note but had left Penang and was residing in Kedah at the date of the institution of the Penang suit. In the Court below the learned Judge, in holding that in these circumstances the Penang Court has jurisdiction to enter judgment against the appellant, appears to have based his decision on a single sentence in the judgment in *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155. In delivering the judgment of the Court in that case, Blackburn, J. said:—

> "If at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound